(22)

No. 02-682

Supreme Court, U.S.
FILED
JUL 25 2003
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

VERIZON COMMUNICATIONS INC.,
Petitioner,

v.

LAW OFFICES OF CURTIS V. TRINKO, LLP,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Second Circuit

BRIEF OF Z-TEL TECHNOLOGIES, INC. AS *AMICUS CURIAE* SUPPORTING RESPONDENT

CHRISTOPHER J. WRIGHT *
TIMOTHY J. SIMEONE
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, N.W.
Washington, DC 20036
(202) 730-1300

CHRISTOPHER V. GOODPASTOR
Z-TEL TECHNOLOGIES, INC.
601 S. Harbour Island Blvd.
Suite 220
Tampa, Florida 33602
(813) 233-4982

* Counsel of Record

July 25, 2003

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

36 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
INTEREST OF *AMICUS CURIAE*	1
BACKGROUND	1
SUMMARY OF ARGUMENT	6
ARGUMENT	10
I. VERIZON AND THE GOVERNMENT RELY ON DISPUTED ISSUES OF FACT, WHICH CANNOT BE RESOLVED AT THE PLEADING STAGE, TO CHARACTERIZE POTENTIAL COMPETITORS INCORRECTLY AS MERE "RESELLERS"	10
II. SECTION 2 AND THIS COURT'S PRECEDENTS IMPOSE AN AFFIRMATIVE DUTY TO DEAL ON THE OWNER OF ESSENTIAL FACILITIES THAT CANNOT REASONABLY OR PRACTICALLY BE DUPLICATED	12
A. Retail Competition Will Not Arise Without Antitrust Intervention When A Monopolist Owns Essential Facilities That Competitors Need To Provide Retail Services	12
B. This Court Has Recognized That A Monopolist's Refusal To Provide Reasonable Access To Essential Facilities Violates Section 2	15

TABLE OF CONTENTS—Continued

	Page
C. *Otter Tail* Squarely Applies To The Essential Transmission Facilities That Competitive Companies Need To Provide Local and Vertical Telecommunications Services	17
D. The Essential Facilities Doctrine Provides A Sound Basis For Identifying When Monopolists Must Deal With Competitors	18
E. Adopting The Government's Test For "Exclusionary" or "Predatory" Conduct Would Eliminate The Essential Facilities Doctrine	19
F. This Court Already Has Rejected The Government's Argument That A Desire To Maintain Retail Profits Justifies A Monopolist's Refusal To Deal In Connection With Essential Facilities	20
G. Verizon's Argument That The Essential Facilities Doctrine Applies Only To Monopolists That Have Voluntarily Dealt With Competitors In The Past Is Incorrect	22
III. THE GOVERNMENT'S ARGUMENTS AGAINST APPLYING A "MONOPOLY LEVERAGING" THEORY IN THIS CASE ARE MISPLACED	23
IV. LIABILITY UNDER SECTION 2 IS FULLY CONSISTENT WITH THE TELECOMMUNICATIONS ACT OF 1996	26
CONCLUSION	30

TABLE OF AUTHORITIES

SUPREME COURT CASES	Page
Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985)	23
AT&T Corp. v. Iowa Utilities Board, 525 U.S. 366 (1999)	5, 6
Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477 (1977)	12
Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992)	*passim*
General Motors Corp. v. Tracy, 519 U.S. 278 (1997)	14
International Salt Co. v. United States, 332 U.S. 392 (1947)	13
Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2 (1984)	26
Otter Tail Power Co. v. United States, 410 U.S. 366 (1973)	*passim*
Standard Oil Co. v. United States, 221 U.S. 1 (1911)	12
United States v. Griffith, 334 U.S. 100 (1948)	13
United States v. Grinnell Corp., 384 U.S. 563 (1966)	12
United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912)	29
Verizon Communications, Inc. v. FCC, 535 U.S. 467 (2002)	*passim*
LOWER COURT CASES	
Delaware & Hudson Railway Co. v. Consolidated Rail Corp., 902 F.2d 174 (2d Cir. 1990)	20
MCI Communications Corp. v. AT&T, 708 F.2d 1081 (7th Cir. 1983)	3, 14, 15, 18

TABLE OF AUTHORITIES—Continued

	Page
Southern Pacific Communications v. AT&T, 740 F.2d 980 (D.C. Cir. 1984)	19
Virgin Atlantic Airways v. British Airways, 257 F.3d 256 (2d Cir. 2001)	23
ADMINISTRATIVE MATERIALS	
In re Amendment of Section 64.702 of the Commission's Rules and Regulations, Final Decision, 77 F.C.C.2d 384 (1980)	4
In re Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York, Memorandum Opinion and Order, 15 FCC Rcd 3953 (1999)	28
In re AT&T Corp. v. Ameritech Corp., Memorandum Opinion and Order, 13 FCC Rcd 21438 (1998)	5
In re Computer II Further Remand Proceedings, 14 FCC Rcd 4289 (1999)	4
In re Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, First Report and Order, 11 FCC Rcd 15499 (1996)	29
Local Telephone Competition: Status as of December 31, 2002 (June 12, 2003)	5
Press Release, *FCC Adopts New Rules for Network Unbundling Obligations of Incumbent Local Phone Carriers* (Feb. 20, 2003)	3
Review of the Section 251 Unbundling Obligations of Incumbent Carriers, Notice of Proposed Rulemaking, 16 FCC Rcd 22781 (2001)	11

TABLE OF AUTHORITIES—Continued

STATUTES	Page
15 U.S.C. § 2	*passim*
Communications Act of 1934, 47 U.S.C. § 151 *et seq.*	
§ 152 note	9, 27
§ 251	26
Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56	*passim*
MISCELLANEOUS MATERIALS	
ABA Section on Antitrust, *Antitrust Law Developments* (5th ed. 2002)	28
P. Areeda and H. Hovenkamp, *Antitrust Law* (2d ed. 2002)	8, 19, 24
R. Bork, *The Antitrust Paradox* (1978)	23
J. Soma, D. Forkner, and B. Jumps, *The Essential Facilities Doctrine in the Deregulated Telecommunications Industry*, 13 Berkeley Tech. L.J. 565 (1998)	13
J. Speta, *Tying, Essential Facilities, and Network Externalities: A Comment on Piraino*, 93 NW U. L. Rev. 1277 (1999)	25

INTEREST OF AMICUS CURIAE

Z-Tel Technologies, Inc. ("Z-Tel") provides telephone service, through its subsidiaries, to more than 250,000 customers in 47 states. Z-Tel's substantial interest in this litigation arises from the company's unavoidable dependence on access to the local telephone networks acquired by the incumbent local exchange carriers ("incumbents"), including petitioner Verizon Communications, Inc. ("Verizon"), during decades of their existence as state-franchised monopolists. Adopting the position advanced in this case by Verizon and by the Department of Justice and the Federal Trade Commission (collectively, the "government") would have substantial, negative consequences for competitors and consumers. Z-Tel therefore respectfully submits this brief to assist the Court in resolving this litigation.

BACKGROUND

1. Z-Tel competes against incumbent local telephone companies by providing telephone service to residential and small-to-medium-sized business customers. Although Verizon erroneously describes competitors like Z-Tel as companies that merely seek to resell incumbent services, Z-Tel is no more a reseller of telephone service than General Motors is a reseller of steel. Z-Tel has invested more than $100 million in "vertical service" capabilities alone.[1] Z-Tel originally was conceived as a *software* company devoted to developing unique vertical services for the telephone. Today,

---

[1] As incumbent SBC Communications, Inc. ("SBC") explained in a recent filing with the Securities and Exchange Commission, "vertical services" are "enhanced telephone services available to retail customers such as Caller ID, Call Waiting, and voice mail. . . . These services are not regulated by the FCC and are generally more profitable than basic local phone service." SBC Form 10-K Report (for fiscal year ending December 31, 2002), at 3-4 (available at http://www.shareholder.com/sbc/downloads/10-K_2002.doc).

its innovative offerings include voice-mail that may be accessed over the Internet; "find me" call-forwarding, which directs calls to multiple numbers when the first number dialed is not answered; and Z-Tel's newest innovation, "Personal Voice Assistant," a unified, voice-recognition messaging service that allows subscribers, simply by using their voice, (1) to make calls or retrieve contact information from their "Outlook" or other address book, and (2) to send voice messages by e-mail from any phone without using a computer.

As a consequence of decades of franchised monopoly and the incumbents' continuing dominance of the Advanced Intelligent Network platform,[2] the overwhelming majority of consumers purchase their vertical services from their local telephone service provider. To maximize Z-Tel's ability to compete for customers, the company expanded its original business plan to serve customers directly as a competitive local exchange carrier.[3]

To provide competitive telephone service, Z-Tel needs to lease "costly bottleneck elements" from the incumbents, "duplication of which is neither likely nor desired." *Verizon Communications, Inc. v. FCC*, 535 U.S. 467, 515 (2002). Competitors cannot economically duplicate the entire local network of "loops," the actual lines running into homes and businesses. Competitors also need access to incumbents' switches because loops are typically "hard-wired" to those switches; it is economically infeasible to bypass that bottleneck using a high-capacity line unless a customer has at

[2] The Advanced Intelligence Network platform allows external computers to control call processing and to manage network information, enabling the provision of sophisticated vertical services.

[3] Z-Tel's most popular product is a "bundled" product that includes its innovative vertical services. *See* www.z-tel.com (describing "Z-LineHOME").

least 18 phone lines in a particular location.[4] Moreover, for technical and economic reasons, competitors that need access to an incumbent's switches also need access to its local transport and signaling.[5]

The incumbents' control of these facilities gives them "an almost insurmountable competitive advantage," so that a "newcomer could not compete with the incumbent carrier to provide local service without coming close to replicating the incumbent's entire existing network." *Verizon*, 535 U.S. at 490. In that regard, little has changed since 1983, when the Seventh Circuit concluded that "MCI could not duplicate Bell's local facilities" because it would not be "economically feasible." *MCI Communica-tions Corp. v. AT&T*, 708 F.2d 1081, 1133 (7th Cir. 1983).

2. The finished products Z-Tel sells are completely different from the inputs it buys from incumbents. Z-Tel's innovative vertical services are obviously different from the inputs (loops, switches, transport, and signaling).[6] But the inputs also differ from basic local voice services. Standing alone, the inputs represent only raw capacity, rather than a finished service. To provide local voice services, Z-Tel must combine the leased capacity with customer service, account

[4] Z-Tel discussed these issues in detail in publicly available comments filed at the Federal Communications Commission. *See* Comments of Z-Tel Communications, Inc., FCC CC Docket 01-338 (Apr. 5, 2002), at 28-56.

[5] The FCC recently rejected the incumbents' argument that competitors do not need access to incumbents' switches, transport, and signaling to provide service to residential and small business customers. *See* FCC Press Release, *FCC Adopts New Rules for Network Unbundling Obligations of Incumbent Local Phone Carriers* (Feb. 20, 2003) ("FCC Press Release").

[6] Moreover, those vertical services are provided primarily by means of equipment based in Tampa, Florida, that Z-Tel does not lease from the incumbents.

management, and billing and collection. It must also undertake the complicated work of charging (and paying) other carriers for sending and receiving calls.[7] These activities may add as much to the cost of providing retail local voice services as do the inputs controlled by the incumbent.[8]

For most of the history of telephone service in the United States, local services were dominated by a single company, AT&T. In the 1980s, the break-up of AT&T permitted the long-distance market and the telephone equipment manufacturing market to become competitive. Local voice services, however, remained dominated by the Regional Bell Operating Companies that spun off from AT&T; these companies continued to provide local voice services as franchised monopolists.[9]

In adopting the Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 ("1996 Act"), Congress sought to open local voice services to competition. Although incum-

[7] For example, when an AT&T customer or a Verizon Wireless customer calls a Z-Tel customer, Z-Tel may be entitled to collect a "terminating access" charge. Similarly, Z-Tel may owe another carrier when one of its customers calls a customer served by another carrier. Z-Tel operates a large call center and its account management staff constitutes a significant portion of Z-Tel's 1,200 employees.

[8] Z-Tel also provides these services at wholesale to other carriers seeking to provide competitive local service, including Sprint and, before its bankruptcy, MCI.

[9] Both before and after the break-up of AT&T, the FCC attempted to foster competition in "enhanced services" (including vertical calling services), recognizing that the "importance of the control of local facilities . . . cannot be overstated." *In re Amendment of Section 64.702 of the Commission's Rules and Regulations*, Final Decision, 77 F.C.C.2d 384, 468 (1980); *see generally In re Computer II Further Remand Proceedings*, 14 FCC Rcd 4289 (1999) (describing the relevant FCC decisions). For vertical services, however, no significant competitive industry emerged to challenge incumbent monopolies until competitors like Z-Tel were allowed to provide competitive voice service.

bent resistance has greatly slowed the development of competition, approximately 14 million residential and small business customers have chosen to obtain service from a competitive local exchange carrier rather than an incumbent.[10] These customers apparently believe that competitive carriers offer differentiated services that are superior to those provided by the incumbent.

3. This case presents the question of whether federal antitrust claims may be stated against incumbents for refusing to deal with competitors that need access to incumbents' essential facilities to provide local voice services. The plaintiff in this case alleges a problem commonly encountered by Z-Tel and other competitive carriers—that Verizon, instead of flatly denying access to its facilities, *effectively* denied access by filling competitors' orders more slowly than its own.[11]

By undermining competitive access to their essential facilities, the incumbents seek to maintain their dominance over both local voice services *and* vertical services. Vertical services are particularly important to incumbents because such services are unregulated, and therefore offer incumbents "a higher profit margin than basic local service." *See, e.g., In re AT&T Corp. v. Ameritech Corp.*, 13 FCC Rcd 21438, 21468 (1998) (quoting the brief of Ameritech—now part of SBC—in that proceeding). Vertical services allow new entrants to distinguish themselves with new and better services, permitting competitors the opportunity to add customers for both vertical and local voice services.[12] The

[10] Federal Communications Commission, *Local Telephone Competition: Status as of December 31, 2002* (June 12, 2003), Table 2.

[11] Pet. App. 6a. The case below was dismissed pursuant to Fed. R. Civ. P. 12(b)(6). Pet. App. 51a. Accordingly, respondent's allegations must be taken as true at this stage.

[12] Z-Tel leases network elements—one of the three means of market entry noted by this Court in *AT&T Corp. v. Iowa Utilities Board*, 525 U.S.

incumbents' efforts to foreclose competition in local voice services not only preserve their dominance (and the associated revenues) in that realm, but also eliminate competition (on both price and quality) in vertical services.

In this case, the Second Circuit concluded that the plaintiff had stated claims under Section 2 of the Sherman Act. First, by alleging that Verizon had denied reasonable access to its bottleneck facilities, the court concluded that the plaintiff had stated a claim under the essential facilities doctrine. Pet. App. 30a. Second, by alleging that Verizon was using its "monopoly power over a wholesale market . . . to gain a competitive advantage in a retail market in which telecommunications carriers sell local phone service to consumers," the court found that the plaintiff had stated a "monopoly leveraging" claim as well. Pet. App. 30a.

SUMMARY OF ARGUMENT

1. To provide its local voice and vertical services to customers, Z-Tel needs access to local telephone transmission facilities owned by incumbents. Although decades of state-sanctioned monopoly over local voice services ended with the passage of the Telecommunications Act of 1996, the incumbents intentionally seek to maintain their dominance in local voice services and vertical services by denying reasonable access to their essential facilities.

The incumbents' conduct violates Section 2. Of course, Section 2 does not broadly prohibit monopoly as such: the underlying premise of the law is that a general governmental proscription of monopoly is unnecessary because, in markets free from exclusionary and predatory conduct, competition will develop without intervention. Competition itself breeds competition and destroys monopolies.

366, 372 (1999)—rather than reselling the incumbents' services because it best permits Z-Tel to distinguish itself by offering both innovative vertical services and better customer service.

As this Court recognized in *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973), however, in certain circumstances the competition necessary to break down monopoly power cannot develop without intervention. Specifically, where essential facilities of the sort owned by the incumbents are involved, a monopoly may be preserved unlawfully and competition eliminated absent an affirmative requirement that the owner of essential facilities deal with competitors. In those narrow circumstances, Section 2's fundamental concern of *protecting the competitive process* requires the imposition of a duty to deal.

The essential facilities doctrine provides a sound basis for identifying the circumstances under which monopolists are required to deal with competitors. Properly construed, the doctrine requires owners of essential facilities that cannot reasonably or practically be duplicated—facilities the "duplication of which is neither likely nor desired," *Verizon*, 535 U.S. at 515—to deal with competitors on reasonable terms to allow the use of those facilities.

Unlike Verizon, which seeks a broad disavowal of the essential facilities doctrine, the government concedes that the doctrine may help to identify Section 2 violations. Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Petitioner ("SG Br.") 22 n.6. Nevertheless, the government's "exclusionary or predatory conduct" standard would eviscerate the doctrine by permitting liability to be found only when a monopolist's "refusal to sell his goods or services below the monopoly price" makes no business sense. SG Br. 22-23. That novel standard incorrectly implies that competitors such as Z-Tel are merely "resellers" by ignoring the difference between finished local voice services and the essential facilities (*i.e.*, loops, transport, switching and signaling) used as inputs into the finished services. Although the antitrust laws might not always prohibit a monopolist from selling a finished retail

service at a monopoly price, that conclusion does not apply to the price of essential facility inputs needed by competitors to create retail services to compete with those offered by the owner of the essential facility. Indeed, there is *no* competitive price at which it would make "business sense" for the owner of an essential facility to sell access to that facility—hence the need for the essential facilities doctrine. In any event, the government's standard should be rejected because it relies on a disputed factual issue of market definition that cannot be resolved at the pleading stage.

The government also suggests that a monopolist's desire to protect revenues in its retail market justifies a refusal to provide reasonable access to essential facilities at wholesale. That argument fails under this Court's precedents. In *Otter Tail*, this Court squarely rejected the defendant's claim that its desire to protect its retail revenues justified its refusal either to sell power to the plaintiffs at wholesale or to allow its essential transmission facilities to be used to "wheel" wholesale power to the plaintiffs from other sources. Similarly, in *Eastman Kodak Co. v. Image Technical Servs., Inc.*, 504 U.S. 451 (1992), this Court rejected the defendant's efforts to preserve its retail service revenues by refusing to sell parts to competitive service providers at wholesale.

2. Plaintiff's monopoly leveraging claim falls squarely within the traditional scope of Section 2. It "requires no extension of Sherman Act §2's basic coverage" to find liability when a company "forces customers of its *A* monopoly to purchase its *B* good rather than the good of any rival." P. Areeda and H. Hovenkamp, 3 *Antitrust Law* 95-96 (2d ed. 2002) ("Areeda & Hovenkamp"). That is precisely what the incumbents seek to do: they wish to use their monopoly over local voice services to force customers to buy profitable vertical services from them, rather than from competitive entrants.

This Court's decision in *Kodak* confirms that efforts by a company with a lawful monopoly to leverage its monopoly into dominance in another market are subject to scrutiny under Section 2. Further, even critics of monopoly leveraging acknowledge that a rate-regulated monopolist's efforts to expand its dominance in a regulated market into a related, unregulated market warrants concern. This case presents more compelling circumstances for stringent review of leveraging efforts than *Kodak* because the incumbents seek to extend their dominance in *regulated* local voice services into dominance over *unregulated* vertical services.

3. Section 2 applies even though the incumbents' efforts to undermine access to their essential facilities also may violate provisions of the 1996 Act. The antitrust savings clause in the 1996 Act expressly provides that the requirements of the Act do not "modify, impair, or supersede the applicability of the antitrust laws." 47 U.S.C. § 152 note.

Both Verizon and the government nonetheless suggest that the existence of the 1996 Act and the unbundling obligations that it imposes on incumbents shields incumbents from antitrust liability. That suggestion is simply wrong. Although a violation of the 1996 Act does not *automatically* create liability under the antitrust laws, violations of "extrinsic statutory or legal duties" may *support* a claim of monopolization or attempted monopolization under Section 2.

Moreover, contrary to Verizon's claims, the 1996 Act's creation of a regulatory regime to establish wholesale prices for bottleneck telecommunications facilities actually *removes* an alleged obstacle to application of the essential facilities doctrine. Under the Act, expert regulators already have determined wholesale prices—including a fair profit for incumbents—and courts adjudicating antitrust claims easily could rely on their determinations.

ARGUMENT

The antitrust causes of action pleaded in this case enjoy solid support in the precedents of this Court and the courts of appeals. The novel contentions of Verizon and the government lack merit because they would transform the market-opening provisions of the 1996 Act into a *de facto* exemption from antitrust scrutiny. This Court should affirm the decision of the Second Circuit and remand this case to the trial court so that the plaintiff may attempt to develop the evidence to support its well-pleaded allegations.

I. VERIZON AND THE GOVERNMENT RELY ON DISPUTED ISSUES OF FACT, WHICH CANNOT BE RESOLVED AT THE PLEADING STAGE, TO CHARACTERIZE POTENTIAL COMPETITORS INCORRECTLY AS MERE "RESELLERS."

Verizon's and the government's arguments rely on a fundamental misunderstanding of fact.[13] Contrary to those litigants' claims, new entrants like Z-Tel do *not* seek access to the incumbents' essential facilities so that they may "resell those services as mere marketers and middlemen." Brief for Petitioner ("Verizon Br.") 3. The essential elements of loops, local transport, switching, and signaling are basic transmission facilities that competitors need to deliver their finished services to consumers, but they are not themselves the finished services that consumers purchase. As the FCC stated, competitive carriers need access to the incumbents'

[13] *See, e.g.*, Verizon Br. 26 (incumbent monopolists cannot be forced to "provide . . . assistance at forced discounts to rivals, even mere resellers, to help them sever Verizon's relationship with its retail customers); SG Br. 20-25 (incumbent monopolists are entitled to insist on monopoly prices for their "goods or services"). As further discussed *infra* at 19-20, these claims improperly assume that competitors like Z-Tel are merely reselling incumbents' services.

facilities "to connect end user customers to the [competitive] carriers' equipment." *Review of the Section 251 Unbundling Obligations of Incumbent Carriers*, Notice of Proposed Rulemaking, 16 FCC Rcd 22781, 22804 n.111 (2001). Once "connected" to customers, competitors provide innovative new vertical and bundled telecommunications offerings, and also offer better customer service and more convenient billing.

Z-Tel perfectly illustrates this point. As noted above, Z-Tel began as a software company, dedicated to developing new vertical services for the telephone; its services now include a unique "Personal Voice Assistant," as well as sophisticated voice-mail and call-forwarding features. These innovative services reside on Z-Tel's computers in Tampa, Florida. Although Z-Tel requires access to incumbents' essential transmission facilities "to connect end user customers to . . . [that] equipment," Z-Tel clearly does not merely "resell" the vertical services described above; rather, Z-Tel provides customers its own vertical services.

Nor does Z-Tel merely resell incumbents' local voice service. As discussed *supra* at 3-4, the unbundled elements of the local network that competitors buy from incumbents are not finished "services," but are simply raw capacity on wires and equipment. To provide local voice services, Z-Tel and other competitive carriers must take that capacity and add all of the "service" components, including account management, billing and collections, and coordination of interconnection with other carriers. By performing these functions more effectively and efficiently than the incumbents, and by combining them with incumbents' essential facilities, competitors can offer improved retail local services that benefit consumers by driving down prices and improving the end-user experience.

In any event, whether competitors such as Z-Tel can be categorized as "resellers," as Verizon contends and the

government implies, depends on the definition of the relevant input and retail product markets. Questions of market definition, however, are intensely factual and ill-suited for resolution at the pleading stage. *See Kodak*, 504 U.S. at 482 (reversing summary judgment and noting that "[t]he proper market definition in this case can be determined only after a factual inquiry into the 'commercial realities' faced by consumers") (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 572 (1966)).[14] Accordingly, even if Verizon's and the government's assumption that competitors are merely resellers were accurate (which it is not), those litigants' arguments fail because they rely on a disputed factual issue that cannot be resolved at this stage of the litigation.

II. SECTION 2 AND THIS COURT'S PRECEDENTS IMPOSE AN AFFIRMATIVE DUTY TO DEAL ON THE OWNER OF ESSENTIAL FACILITIES THAT CANNOT REASONABLY OR PRACTICALLY BE DUPLICATED.

A. Retail Competition Will Not Arise Without Antitrust Intervention When A Monopolist Owns Essential Facilities That Competitors Need To Provide Retail Services.

Section 2 of the Sherman Act was "enacted for the protection of competition, not competitors," *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977). The Sherman Act does not broadly "prohibit or condemn 'monopoly in the concrete,'" SG Br. 10 (quoting *Standard Oil Co. v. United States*, 221 U.S. 1, 62 (1911)); a general governmental prescription of monopoly is unnecessary

[14] Moreover, even if competitors ultimately *were* proved to be mere resellers, they would still be entitled to rely on an incumbent's evasions of its regulatory obligation *for the purpose of maintaining its monopoly* to show a violation of Section 2. *See infra* at 28-29.

because, in markets free from exclusionary and predatory conduct, competition usually will develop without intervenetion. That competition will, in turn, tend to break down monopolies.[15]

In circumstances involving a monopolist's control of essential facilities, however, antitrust law intervenes to protect the competitive process because competition will not otherwise arise. As this Court has held, it is "unreasonable, *per se*, to foreclose competitors from any substantial market." *International Salt Co. v. United States*, 332 U.S. 392, 396 (1947). "The antitrust laws are as much violated by the prevention of competition as by its destruction." *See United States v. Griffith*, 334 U.S. 100, 107 (1948); *see also Kodak*, 504 U.S. at 482-83 (Section 2 forbids the use of monopoly power "to foreclose competition, to gain a competitive advantage, or to destroy a competitor.") (quoting *Griffith*, 334 U.S. at 107). Section 2 is thus intended not to eliminate isolated bad acts, but to protect the competitive process so that competition may emerge.

This Court already has acknowledged—in the context of the gas and electric industries—that competition will not develop naturally when a monopolist owns an essential facility that cannot reasonably or practically be duplicated by competitors:

> Companies supplying manufactured gas proliferated in the latter half of the 19th century and, after initial efforts at regulation by statute at the state level proved unwieldy, the States generally left any regulation of the industry to local governments. Many of those municipalities honored the tenets of laissez-faire to the

[15] *See, e.g.*, J. Soma, D. Forkner, and B. Jumps, *The Essential Facilities Doctrine in the Deregulated Telecommunications Industry*, 13 Berkeley Tech. L.J. 565, 581 (1998) ("Congress enacted the antitrust laws to promote economic efficiency via the protection of the competitive process.").

> point of permitting multiple gas franchisees to serve a single area and relying on competition to protect the public interest. The results were both predictable and disastrous, including an initial period of "wasteful competition," followed by massive consolidation and the threat of monopolistic pricing.

General Motors Corp. v. Tracy, 519 U.S. 278, 288-89 (1997) (internal citations omitted). The evolution of the electrical industry followed a similar course:

> Again, after an initial period of unsuccessful regulation by state statute, States mostly left regulation of the electric industry to municipal or local government. Multiple franchises were handed out, and duplicative utility systems came into being. The results were ruinous and short-lived. For example, 45 mostly overlapping franchises were granted for electric utility operation in Chicago between 1882 and 1905. By 1905, however, a single monopoly entity had emerged from the chaos, and customers ended up paying monopoly prices.

Id. at 290 n.7 (internal citations omitted). The *GMC* Court concluded that, where bottleneck distribution facilities exist, the states had learned "from chastening experience" that competition could not be relied upon to eliminate monopolies, but would "simply give over to monopoly in due course." *Id.* at 290.

The same is true in the context of the local telephone network, where the local transmission bottleneck closely resembles those of the gas and electric industries. As the Seventh Circuit wrote in *MCI v. AT&T*, it simply "would not be economically feasible for [a competitor] to duplicate [the incumbents'] local distribution facilities (involving millions of miles of cable and line to individual homes and businesses)." 708 F.2d 1081, 1133 (7th Cir. 1983). In such circumstances, competition will not develop to break up the monopoly and the antitrust laws should "impose[] on firms

> controlling [the essential transmis-sion facilities] the obligation to make the facilit[ies] available on non-discriminatory terms." *Id.* at 1132.

In all of these industries—gas, electric, and telecommunications—competition is entirely possible in the *retail* products[16]: it is the bottleneck nature of the *transmission facilities* that prevents the development of competition in the retail markets. As this Court has recognized, imposing a duty to deal under Section 2 to provide access to those transmission facilities is necessary to enable retail competition to develop. Consequently, the government's argument that Section 2 never imposes an affirmative duty to deal on a monopolist whose actions "make business or economic sense" is simply incorrect. SG Br. 7.

B. This Court Has Recognized That A Monopolist's Refusal To Provide Reasonable Access To Essential Facilities Violates Section 2.

This Court's decision in *Otter Tail*, which involved transmission facilities for electric power, recognized that antitrust intervention is necessary to enable competition to arise when a transmission bottleneck exists. *Otter Tail* addressed the refusal of an electric utility either (1) to allow municipalities seeking to sell electricity at retail to use the utility's regional transmission facilities to transmit power purchased from another provider, or (2) to sell its own power at wholesale to such municipalities. The Court focused on

---

[16] *See, e.g.*, http://www.platts.com/features/usgasguide/retail.shtml (13 states have retail competition in the gas industry); http://www.eia.doe.gov/cneaf/electricity/chg_str/booklet/progress.html (as of 1999, 24 states had passed statutes to enable retail competition in the electric industry). The Telecommunications Act of 1996 was motivated in substantial part by the realization that retail competition for telecommunications services, including local and vertical services, is entirely possible if access to essential transmission facilities is available on reasonable terms.

the bottleneck nature of Otter Tail's transmission facilities; it noted the district court's determination that Otter Tail "ha[d] 'a strategic dominance in the transmission of power in most of its service area,' and that it used this dominance to foreclose potential entrants into the retail area from obtaining electric power from outside sources of supply." 410 U.S. at 377. The Court concluded that Otter Tail's refusal to deal with the towns to supply access to its transmission facilities "sought to substitute for competition anticompetitive uses of its domin-ant economic power." *Id.* at 380. The Court therefore upheld the district court's order enjoining Otter Tail from refusing to deal. *Otter Tail* thus recognized that Section 2's protection of the competitive process requires an affirmative duty to deal in connection with essential facilities.

Although the dissent in *Otter Tail* questioned the need for applying Section 2 in that context,[17] its analysis makes clear that this case is far easier. Justice Stewart argued that monopoly was inevitable in retail distribution of electricity, and that "the inevitability of a monopoly . . . requires price control to take the place of competition." 410 at 389. As a result, he believed, "antitrust principles applicable to other industries cannot be blindly applied" to the electric industry. *Id.* In other words, in *Otter Tail* the utility tried to use its dominance over transmission to foreclose entrants into the retail market—but the dissenters believed that the retail product was *inevitably* a price-regulated monopoly, so there was nothing to be gained by traditional application of the antitrust laws. As noted above, however, it is now widely accepted that retail competition is entirely possible in the context of bottleneck transmission facilities if reasonable access to essential facility *inputs* into the finished retail services is assured. *See supra* at 15 & n.16. Thus, *Otter*

[17] Justice Stewart's opinion, joined by Chief Justice Burger and then-Justice Rehnquist, actually concurred in a part of the majority opinion not relevant here, but otherwise dissented.

Tail's holding—preventing the utility from withholding the essential transmission input into retail electrical service—is particularly relevant to modern retail competition.

C. *Otter Tail* Squarely Applies To The Essential Transmission Facilities That Competitive Companies Need To Provide Local and Vertical Telecommunications Services.

Otter Tail's recognition that Section 2 imposes an affirmative duty to deal on owners of essential transmission facilities applies to this case. The parallel is obvious in connection with competitors' provision of vertical services. In *Otter Tail*, towns wished to use the utility's essential transmission facilities to transmit electricity from outside sources to retail end-users. Similarly, competitors like Z-Tel wish to use the incumbents' essential transmission facilities to transmit vertical services from outside sources (such as Z-Tel's computers in Tampa) to retail end users.

The same parallel applies to competitors' provision of local voice services. Contrary to the arguments of the government and Verizon, the incumbents' local transmission facilities are *not* identical to the retail local voice services provided to end users any more than the utility's transmission facilities were identical to the retail electric service in *Otter Tail*. In both cases, the essential network facilities to which competitors seek access represent merely raw transmission capacity. To provide a retail service, competitors like Z-Tel add customer service, account management, billing and collections (including the complex yet vital activities of charging other carriers for sending and receiving calls and paying still other carriers to send or receive calls), and other components. Competitors need the incumbents' essential transmission facilities merely as an *input* into finished local voice services provided to end users.

D. The Essential Facilities Doctrine Provides A Sound Basis For Identifying When Monopolists Must Deal With Competitors.

The essential facilities doctrine, recognized by every federal court of appeals,[18] reflects the fundamental principle of *Otter Tail*: when a company controls essential facilities that competitors need to deliver their retail services to consumers, the Sherman Act imposes an affirmative duty to provide access to the facilities on reasonable terms. Properly applied, the doctrine provides a sound basis for identifying when monopolists should be required to share their facilities. Specifically, the doctrine imposes a duty to deal only when four elements are present: "(1) control of the essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility." *MCI*, 708 F.2d at 1132-33.

The second prong is critical: the doctrine requires only owners of bottleneck facilities that cannot reasonably or practically be duplicated—in the *Verizon* Court's terms, facilities the "duplication of which is neither likely nor desired," 535 U.S. at 515—to deal with competitors on reasonable terms to allow the use of those facilities. Significantly, even critics of the essential facilities doctrine acknowledge that local telephone transmission networks satisfy this narrow notion of "essentiality." Areeda and Hovenkamp's antitrust treatise, for example, cites the "natural monopolies of the local telephone exchanges in the *MCI* and *Southern Pacific* cases" as the clearest example of truly "essential" facilities, noting that "[o]ne could not sell residential and most business long distance service without access to the hardwired local statutory monopolies controlled

[18] For a list of relevant cases, *see* Brief in Opposition to Petition for Certiorari of the Law Offices of Curtis Trinko, L.L.P., at 22.

by the defendant." Areeda & Hovenkamp, 3A *Antitrust Law* 199 (citing *MCI*, 708 F.2d at 1132, and *Southern Pacific Communications v. AT&T*, 740 F.2d 980 (D.C. Cir. 1984)). As discussed above, the same is true of local voice and vertical services.

E. Adopting The Government's Test For "Exclusionary" or "Predatory" Conduct Would Eliminate The Essential Facilities Doctrine.

The government correctly concedes that the essential facilities doctrine fits within the framework of the Sherman Act. At the same time, however, the government argues that liability should be found only when a monopolist's "refusal to sell his goods or services below the monopoly price" is "exclusionary" or "predatory"—*i.e.*, when the refusal to sell makes no business sense. *See* SG Brief at 21-22. The government's concession is illusory; its proposed standard would eviscerate the essential facilities doctrine.

The government incorrectly implies that Z-Tel and other competitive carriers are mere resellers by confusing the market for a finished retail service (local voice and vertical services) with the market for the essential transmission facilities (loops, local transport, switching, and signaling) used as inputs in the provision of the retail service. In arguing that the incumbents should be allowed to "refus[e] to sell [their] goods or services below the monopoly price," SG Br. at 23, the government fails to recognize that the "goods" at issue here are merely *inputs* into the finished service. As a business matter, there is no price at which a monopolist will sell essential inputs to rivals such that it will suffer a reduction of its market power; indeed, the theoretical economic price of an input that cannot reasonably or practically be duplicated is infinitely high. The monopolist will simply refuse to deal or, equivalently, deal only on terms

that make potential competitors unprofitable.[19] Under this Court's ruling in *Otter Tail*—and the essential facilities doctrine reflecting that ruling—a monopolist *cannot* be allowed to refuse to deal in connection with essential transmission facilities, because that would eliminate the possibility of competition in the retail market for the finished product. In short, although the government pays lip service to the essential facilities doctrine in some circumstances, the logic of its argument leaves no room for the doctrine's application.

F. This Court Already Has Rejected The Government's Argument That A Desire To Maintain Retail Profits Justifies A Monopolist's Refusal To Deal In Connection With Essential Facilities.

The government also suggests that a monopolist's desire to sell at retail rather than at wholesale justifies a refusal to provide reasonable wholesale access to essential facilities. *See, e.g.*, SG Br. 29 (stating that the complaint should be dismissed because incumbents cannot be obliged by Section 2 to "act[] as wholesalers"). This Court has rejected that argument repeatedly. First, in *Otter Tail*, the utility urged that it had a "business justification" for refusing to wheel power or to sell at wholesale. Otter Tail claimed that if it were to do so, "more and more municipalities" would go into the distribution business, and Otter Tail would lose retail customers and "go downhill." 410 U.S. at 380.[20] The Court

[19] An offer to deal at an unreasonable price is, of course, tantamount to a refusal to deal. *See, e.g., Delaware & Hudson Railway Co. v. Consolidated Rail Corp.*, 902 F.2d 174, 179 (2d Cir. 1990) ("[T]here need not be an outright refusal to deal in order to find the denial of an essential facility occurred. It is sufficient if the terms of the offer to deal are unreasonable.").

[20] The dissent regretted that the Court "scoff[ed]" at this "business justification" defense. Justice Stewart argued that "where the health of

responded brusquely, stating that "[t]he promotion of self-interest alone" does not insulate efforts to preserve a monopoly from liability under Section 2: "Th[e] Act assumes that an enterprise will protect itself against loss [of retail customers] by operating with superior service, lower costs, and improved efficiency," not by "substitut[ing] for competition anticompetitive uses of its dominant economic power." *Id.* Accordingly, the incumbents have the option of maintaining retail customers by out-competing new entrants through the development of better and cheaper retail services; but Section 2 does not permit the incumbents to substitute the use of their dominance over local transmission facilities for competition in retail services.

Second, *Eastman Kodak v. Image Technical Services* also directly rebuts the government's suggestion that efforts to maintain retail customers by unreasonably refusing to sell at wholesale are exempt from Section 2's prohibitions.[21] The *Kodak* plaintiffs ("independent service organizations" or "ISOs") alleged that the company's refusal to sell them parts used in the repair of Kodak copiers represented

power companies and the abundance of our energy supply were considerations central to the congressional purpose in devising the regulatory scheme," protecting Otter Tail's economic health was an appropriate consideration. *Id.* at 389. In the present context, however, there can be no claim that Congress has sought to protect the economic health of the incumbents at the expense of competition; to the contrary, this Court's recent decision in *Verizon* emphasized that Congress wished to "give aspiring competitors every possible incentive to enter local retail telephone markets, short of confiscating the incumbents' property." 535 U.S. at 489.

[21] *Kodak* involved "monopoly leveraging," although the Court employed traditional Section 2 analysis. *See* 504 U.S. at 479 n.29 (rejecting the dissent's view that the antitrust laws "do not apply" to efforts to extend an "inherent" monopoly into other markets). *Kodak*'s "monopoly leveraging" holding is discussed below in the portion of our brief addressing that issue. *See infra* at 23-26.

monopolization or attempted monopolization of the copier service market (because repairs could not be made without parts). Kodak's policy was motivated by a desire to retain the lucrative service component of its copier clients' retail business, rather than selling its parts at wholesale and risking the deterioration of its retail business. This Court found that the plaintiffs' had presented evidence of a Section 2 violation because Kodak had "used its control over parts to strengthen its monopoly share of the Kodak service market," so "[l]iability turn[ed] . . . on whether 'valid business reasons' can explain Kodak's actions." *Id.* at 483.

Kodak declined to make the brazen argument presented by the government in this case—that the company's desire to maintain its *retail* (service) monopoly rather than selling parts at *wholesale* constituted a "valid business reason." Realizing that a company's bare desire to maintain supra-competitive profits cannot be a valid business justification under Section 2, Kodak instead made the similar argument that its refusal to sell parts to ISOs was justified to prevent them from "free-riding on Kodak's capital investment." *Id.* According to Kodak, the ISOs were "free-riding" because "they ha[d] failed to enter the equipment and parts markets." *Id.* at 485. This Court rejected that claim, however, because "[t]his understanding of free-riding has no support in our case law." *Id.* Rather, "one of the evils proscribed by the antitrust laws is the creation of entry barriers to potential competitors by requiring them to enter two markets simultaneously." *Id.*

G. Verizon's Argument That The Essential Facilities Doctrine Applies Only To Monopolists That Have Voluntarily Dealt With Competitors In The Past Is Incorrect.

Verizon argues that there is "no prima facie reason to question a refusal of never-before-offered terms" and that doing so here would require every monopolist to "dismantle its retail monopoly." Verizon Br. 19. Clearly, however, the

essential facilities doctrine would not require the "dismantling" of retail monopolies maintained due to legitimate efficiencies—the doctrine would apply only to monopolies resulting purely from ownership of essential facilities.[22] Moreover, a monopolist should not be permitted to refuse to deal simply because it consistently refused to deal with competitors in the past, as opposed to terminating existing deals. Although making an "important change" such as terminating existing relations may have evidentiary significance in some contexts, this Court has held that "[i]f a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985) (quoting R. Bork, *The Antitrust Paradox* 138 (1978)). Excluding rivals by consistently refusing to lease bottleneck facilities in all circumstances is certainly no less predatory than refusing to deal only some circumstances.

III. THE GOVERNMENT'S ARGUMENTS AGAINST APPLYING A "MONOPOLY LEVERAGING" THEORY IN THIS CASE ARE MISPLACED.

The circuit court found that petitioner may be able to prove a "monopoly leveraging" claim, which, under Second Circuit law, would require showing that respondent "(1) possessed monopoly power in one market; (2) used that power to gain a competitive advantage . . . in another distinct market; and (3) caused injury by such anticompetitive conduct." Pet. App. 30a (quoting *Virgin Atlantic Airways v. British Airways*, 257 F.3d 256, 272 (2d Cir. 2001)). The government rejects this "gain-a-competitive-advantage" formulation of the monopoly

---

[22] In this case, the incumbents' monopoly not only derives from control of essential facilities, but from essential facilities 1) that they own as the result of a state-granted monopoly over local services; and 2) that were entirely funded (including a profit for the monopolist) by the ratepayers.

leveraging theory, claiming that the Sherman Act "proscribes [only] monopolization or attempted monopolization, rather than [mere] 'misuse' of market power." SG Br. 26. The government also maintains that "[s]uch a theory is incompatible with the antitrust laws" because it potentially could extend antitrust liability to "monopolists that gain *any* competitive advantage," including from "economies of scope or scale, or the ability to sustain expensive research and development efforts." SG Br. 27 (emphasis added). Both of those concerns are misplaced in the present context.

First, although the government cites Areeda and Hovenkamp in rejecting the Second Circuit's application of the monopoly leveraging theory, it fails to acknowledge these scholars' view that it "requires no extension of Sherman Act §2's basic coverage" to find liability where "the defendant has used or is using its monopoly power in one market to create a monopoly in a second market—for example, when it forces customers of its *A* monopoly to purchase its *B* good rather than the good of any rival." Areeda & Hovenkamp, 3 *Antitrust Law* 95. Z-Tel and other competitors face this problem: the incumbents seek to expand their dominance in local voice services (*A*) into vertical services (*B*). As a consequence of decades of franchised monopoly and the incumbents' control of access to the AIN platform, *see supra* at 2 and n.2, vertical services are nearly always supplied by a customer's local service provider. Incumbents clearly retain dominance in local voice services, and therefore have (at the very least) a "dangerous probability" of attaining a monopoly in vertical services. Accordingly, the Court does not need to address the government's quibble with the Second Circuit's formulation of the "monopoly leveraging" theory in the context of leveraging claims against incumbent telephone companies. Such claims fall within the traditional scope of Section 2.

This Court's decision in *Kodak* confirms that conclusion. *Kodak* was a traditional Section 2 case involving allegations that Kodak had monopolized or attempted to monopolize the service market by refusing to sell parts to ISOs—in other words, Kodak was attempting to leverage its *A* market in parts into the *B* market for service. After finding that Kodak had monopoly power in the relevant market, thus satisfying the first element of a Section 2 claim, this Court held that the second element of a § 2 claim is met when a monopolist uses its "monopoly power 'to foreclose competition, to gain a competitive advantage, or to destroy a competitor.'" 504 U.S. at 482. At the summary judgment stage, the Court found that respondents' evidence that Kodak had "used its control over parts to strengthen its monopoly share of the Kodak service market" satisfied that requirement. *Id.* at 483.[23] In short, *Kodak* represents a finding by this Court that efforts by a company with a lawful monopoly to leverage that monopoly into dominance in another market are subject to scrutiny under Section 2.

The government's second concern—that a broad doctrine of "monopoly leveraging" might improperly extend antitrust liability to monopolists attempting to leverage "any competitive advantage," SG Br. 27, however benign—is simply inapposite here. Even critics of monopoly leveraging in other contexts acknowledge that "monopoly leveraging has rightly been a concern where natural monopoly prevails, principally because the monopolists have been rate-regulated."[24] Because the purpose of such rate regulation is to prevent the monopolist from collecting monopoly rents in

---

[23] As set forth *supra* at 21-22, the Court also rejected Kodak's argument that its refusal to deal with ISOs was justified by its desire to maintain the retail services component of its customers' business.

[24] *See, e.g.*, J. Speta, *Tying, Essential Facilities, and Network Externalities: A Comment on Piraino*, 93 NW U. L. Rev. 1277, 1280 (1999).

the regulated market, such entities have a strong incentive to attempt to extend their dominance in the regulated industry into related, *unregulated* markets where they will be able to charge supra-competitive prices.[25]

Z-Tel and other competitors face precisely this problem in the telecommunications context. Because the incumbents' local voice services are rate-regulated, they wish to leverage their local dominance into unregulated vertical services. Consistent with *Kodak* (and the views of Areeda and Hovenkamp)—and contrary to the positions taken by the government and respondent—such leveraging represents a garden-variety violation of Section 2.

IV. LIABILITY UNDER SECTION 2 IS FULLY CONSISTENT WITH THE TELECOMMUNICATIONS ACT OF 1996.

In addition to arguing that the conduct alleged in this case does not implicate Section 2, Verizon also makes the curious claim—not joined by the government—that the 1996 Act renders enforcement of the antitrust laws "inadvisable" here, even if they are applicable. Verizon Br. 34-40. The 1996 Act imposes certain obligations on incumbent local exchange carriers to lease elements of their local bottleneck facilities to competitors, independent of (but consistent with) their obligations under the antitrust laws. *See, e.g.*, 47 U.S.C. § 251(c). But, as the government acknowledges

---

[25] As Justice O'Connor explained in the similar context of tying allegations:

> In a regulated industry a firm with market power may be unable to extract a monopoly profit because it lacks control over the prices it charges for regulated products or services. Tying may then be used to extract that profit from sale of the unregulated, tied products or services.

Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 36 n.4 (1984).

> the 1996 Act does not by its terms bar application of the Sherman Act to the same sphere of conduct or provide immunity from Section 2 prosecutions. To the contrary, the 1996 Act includes a savings clause that recognizes that the antitrust laws impose distinct obligations and that neither set of laws displaces the other. Specifically, the 1996 Act provides . . . that it should not "be construed to modify, impair, or supersede the applicability of any of the antitrust laws."

SG Br. 10-11 (citing 47 U.S.C. § 152 note).

In light of the 1996 Act's savings clause, Verizon is left to argue vaguely that applying the antitrust laws in the presence of the 1996 Act would somehow threaten the functioning of the regulatory regime. But that is not the case—Congress presumably went to the trouble of expressly preserving antitrust law in the 1996 Act precisely because it *reinforces* the pro-competitive purposes of the Act.[26]

Although the government does not join in Verizon's strained immunity argument, it advances an unmeritorious argument premised on the 1996 Act that would have the same effect. The government criticizes the lower court for "appear[ing] to have assumed" that "reasonable access"

---

[26] Moreover, as the court below noted, there is nothing novel about applying the antitrust laws in the context of a pro-competitive regulatory statute:

> In [*Otter Tail*], the Supreme Court held that the antitrust laws apply to at least one other industry regulated by a statute that was intended to encourage competition in the industry . . . . The Court noted that the Act embodied "an overriding policy of maintaining competition to the maximum extent possible consistent with the public interest" . . . . And despite a specific regulatory structure that was [like the 1996 Act] meant to encourage competition through interconnection, the Court found that the Federal Power Act did not preclude an antitrust suit against the regulated utility.

Pet. App. 34a-35a.

means "on the terms provided under the 1996 Telecommunications Act rather than on such terms as would make business sense" for the monopolist. According to the government, that "inappropriately imports Telecommunications Act duties and standards into the antitrust laws." SG Br. 24. By claiming that incumbents are always justified in refusing to sell essential inputs for less than the monopoly price of a finished retail service, however, the government erroneously "assumes" that violations of the 1996 Act can *never* create liability under the antitrust laws. That assumption appears to render the antitrust savings clause surplusage; in any event, it is plainly contrary to the clause's terms.[27]

The government also fails meaningfully to address the established principle that a breach of an "extrinsic statutory or legal duty" may support a monopolization claim.[28] The

---

[27] It is also contrary to the legislative history of the statute. *See. e.g.*, President's Statement upon Signing, S. 652, 32 Weekly Comp. Pres. Doc. 218 (Feb. 8, 1996) ("This clause ensures that even for activities allowed under or required by the legislation, or activities resulting from FCC rulemaking or orders, the antitrust laws continue to apply fully.") Notably, the FCC does not appear to read the antitrust savings clause like the government. In granting Verizon's petition for authorization to provide long-distance service in New York, the FCC stated: "Furthermore, Bell Atlantic [Verizon's predecessor] risks liability through antitrust and other private causes of action if it performs in an unlawfully discriminatory manner." *In re Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953, 4165 (1999). The FCC was right: by providing discriminatory access to their facilities, incumbents may be liable under the antitrust laws as well as other laws, including the 1996 Act.

[28] *See* ABA Section on Antitrust, *Antitrust Law Developments* 249 (5th ed. 2002) ("Where conduct contributes to establishing or maintaining monopoly power, a court will be especially likely to find such conduct predatory or anticompetitive if it is also improper for reasons extrinsic to the antitrust laws.").

government expressly acknowledges the line of cases so holding, and concedes that evidence of "fraud and deception," "enforcement of a fraudulently obtained patent," or "sham litigation or bad-faith contact with administrative agencies" may all form the basis of a monopolization claim. *See* SG Br. 12 n.3; 14 n.4; 25 n.10. Nevertheless, it simply announces its view that violations of the 1996 Act are different.

The government's bald assertion is wrong. Once again, *Otter Tail* provides a close analogy to this case. This Court repeatedly noted that Otter Tail had refused to interconnect with requesting municipalities for the purpose of wheeling power, notwithstanding the Federal Power Commission's requirement that it do so. *Otter Tail*, 410 U.S. at 371-72, 376-77, 380 n.10. That violation of an extrinsic duty, far from insulating Otter Tail from antitrust liability, clearly contributed to this Court's holding that Otter Tail had violated Section 2.[29]

In its brief, the government also confuses the issue of liability with remedy. As to *remedy*, as the government acknowledges, this Court's decision in *Terminal Railroad* calls for "equal access on reasonable terms." SG Br. 24 n.9 (quoting *United States v. Terminal R.R. Ass'n*, 224 U.S. 383, 411 (1912)). That is precisely what cost-based rates established by regulators under the 1996 Act accomplish—as the Antitrust Division advised the FCC when it urged the FCC to adopt the pricing rules upheld by this Court in *Verizon*.[30] That acknowledgement makes the government's

---

[29] Moreover, by suggesting that incumbents may decide whether allowing access "would make business sense," SG Brief at 24, without regard to the legal regime under which the business operates, the government implicitly endorses the view that it may make "business sense" to violate the law, thereby securing immunity from antitrust scrutiny.

[30] *See* Comments of the United States Department of Justice, CC Docket 96-98 (May 16, 1996), at 31. The FCC followed the Division's

apparent belief that a monopolist cannot be *liable* under the antitrust laws if the *remedy* would require the monopolist to charge less than monopoly rates all the more inexplicable.

Finally, the existence of a regulatory scheme to establish wholesale prices for bottleneck telecommunications facilities actually *removes* a practical issue flowing from the application of the essential facilities and monopoly leveraging theories. On account of that regulatory regime, courts finding liability will not have to wrestle at the remedial phase of an antitrust case involving bottleneck local telephone facilities with the vexatious issue of determining "reasonable terms." That has already been done by expert regulators. Thus, the existence of a regulatory scheme that explicitly does not modify, impair, or supersede the antitrust laws not only presents no barrier to the application of Section 2, but actually renders application of Section 2 more straightforward as a practical matter.

CONCLUSION

The judgment of the court of appeals should be affirmed.

---

advice. *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499 (1996) ("*First Report and Order*"), 15821 (summarizing the Antitrust Division's views), 15846-47 (adopting a methodology designed to establish prices for network elements "based on costs similar to those incurred by the incumbents").

Respectfully submitted,

CHRISTOPHER J. WRIGHT *
TIMOTHY J. SIMEONE
HARRIS, WILTSHIRE & GRANNIS LLP
1200 Eighteenth Street, N.W.
Washington, DC 20036
(202) 730-1300

CHRISTOPHER V. GOODPASTOR
Z-TEL TECHNOLOGIES, INC.
601 S. Harbour Island Blvd.
Suite 220
Tampa, Florida 33602
(813) 233-4982

* Counsel of Record

July 25, 2003